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BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

TN REGULATORY AUTHORITY
GENERAL COUNSEL'S OFFICE

IN RE:

UNITED CITIES GAS PETITION FOR
APPROVAL OF NEW OR REVISED
FRANCHISE AGREEMENTS WITH
KINGSPORT, BRISTOL, MORRISTOWN
AND MAURY COUNTY

Docket No. 00-00562

REC'D TN
REGULATORY AUTH.
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OFFICE OF THE
EXECUTIVE SECRETARY

PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW OF CITY OF BRISTOL

This matter is before the Tennessee Regulatory Authority on a petition filed by United Cities Gas Company (hereinafter "United Cities") to approve certain franchise agreements between it and four local governments, including the City of Bristol (hereinafter "Bristol" or "City of Bristol"). Bristol respectfully submits the following proposed findings of fact and conclusions of law.

I. FINDINGS OF FACT

The City of Bristol anticipates the evidence before the authority will show substantially as follows:

1. Bristol is a municipal corporation located in Sullivan County existing under and governed by a private act charter enacted by the Tennessee general assembly. Bristol has been in continuous existence since 1856.

2. United Cities is a division of Atmos Energy Corporation (hereinafter "Atmos"), a corporation organized and existing under the laws of the State of Texas. "United Cities is a public utility as defined in *Tenn. Code Ann.* § 65-4-101, and is engaged in the distribution and sale of natural gas to the public in Bristol, Columbia, Elizabethton, Franklin, Nolensville, Greeneville, Johnson City, Jonesborough, Kingsport, Lynchburg, Maryville, Alcoa, Morristown, Murfreesboro, Shelbyville, Spring Hill and Union City, Tennessee and in various municipalities in the states of Illinois, Missouri, Kansas, Iowa, Georgia,

South Carolina and Virginia." In re Atmos Energy Corporation, Tennessee Regulatory Authority, Docket No. 96-01299, Order of January 24, 1997, 1997 WL 78685.

3. As provided in its charter, Bristol's governing body consists of a five-person city council elected by the qualified voters of the city. The members of the city council serve four-year staggered terms of office. Each year the city council selects one of its members to serve as mayor for the ensuing year.

4. Bristol's chief administrative officer is an appointed city manager who serves at the pleasure of the city council. Anthony R. ("Tony") Massey has been Bristol's city manager since June 24, 1996. Mr. Massey was Bristol's principal negotiator of the 1999 amended franchise agreement which is a subject of this proceeding.

5. Bristol's population is approximately 25,000, and its corporate boundaries encompass an area of approximately 30.5 square miles.

6. Bristol has approximately 450 miles of public rights-of-way.

7. The Sullivan County Comprehensive Growth Plan, as adopted in 2000 pursuant to *Tenn. Code Ann.* § 6-58-101 *et seq.*, designates Bristol's urban growth boundaries as comprising an additional 34.80 square miles.

8. For many years, United Cities and its predecessors have operated a natural gas transmission and distribution system in Bristol under various franchise agreements with the city. Each such agreement has allowed United Cities to operate a gas system within Bristol and to use the public rights-of-way for its gas lines and related apparatus. In return, the franchise agreements provided that United Cities would pay the city a franchise fee.

9. United Cities has approximately 487,000 feet of gas lines in Bristol. Ninety-five percent (95%) of these lines lie within the public rights-of-way.

10. In the absence of a franchise agreement with Bristol allowing United Cities to use the public rights-of-way, United Cities could not provide an effective level of gas service to the city or the surrounding area.

11. In 1983, United Cities and Bristol entered into a franchise agreement which provided for a term of 25 years and a franchise fee of 2½ % of annual gross revenues from the sale of gas in the city.

12. For many years, Sullivan County used Bristol's municipal building for county offices and courts. In the early 1990's, Sullivan County and Bristol agreed to construct a new Justice Center building on property adjacent to the municipal building which had served as its parking lot. The county offices and courts would move into the new building. Bristol approached United Cities in 1995, expressing the city's desire to lease from the gas company a tract of adjoining real property. This property would be used as a public parking lot for the new Justice Center and Bristol's municipal building.

13. United Cities was receptive to leasing the property to Bristol, and it advised the city that the base rent for the leased property would be \$6,600.00 per year with an annual lease escalation of 2.5%.

United Cities, then proposed an alternative:

"In an effort to lower the costs to our Bristol and Sullivan County taxpayers and ratepayers, United Cities is willing to waive all base rent and escalation amounts in exchange for a City of Bristol, Tennessee franchise extension to coincide with the lease term, both of which would then expire in 2025." [Letter of July 6, 1995 from Gary W. Price to Frank W. Clifton, Jr.].

14. This proposal was agreeable to Bristol and Sullivan County, and the terms of a new franchise agreement were negotiated by Bristol and United Cities.

15. Language for the new franchise agreement, including a provision for a periodic adjustment of the franchise fee, was proposed by United Cities. [Facsimile of August 23, 1995 from Gary W. Price to Sandra Schofer].

16. On October 3, 1995, the Bristol city council, following a public hearing, adopted on final reading an ordinance [No. 95-60] granting a new franchise to United Cities, and at the same meeting the

city council passed a resolution approving a 30-year ground lease agreement with United Cities [Resolution 95-27]. The term of the franchise was 30 years, and the term of the lease was 30 years. The new franchise provided for a franchise fee of 5%.

17. The new franchise was accepted by United Cities on November 6, 1995. [Acceptance of Franchise signed by Gene C. Koonce, President].

18. The Tennessee Regulatory Authority found that the new franchise agreement was "fair, necessary, reasonable and proper to serve the public convenience and conserve the public interest," and approved the same. In re Petition of United Cities Gas Company for Approval of Various Franchise Agreements, Tennessee Regulatory Authority, Docket No. 96-01487, Order of March 4, 1997.

19. The new Sullivan County Justice Center project was completed in 1998, and the adjacent property leased from the gas company has provided free public parking for patrons of that building and Bristol's municipal building.

20. In 1997, United Cities approached Bristol with a proposed amendment to the 1995 franchise agreement. By letter of January 7, 1997, United Cities notified Bristol of its plan to merge into Atmos Energy Corporation and asked the city to authorize "the transfer of the franchise for a natural gas transmission and distribution system in the City of Bristol, TN, and held by United Cities Gas Company, to Atmos Energy Corporation." A proposed ordinance was enclosed with the letter. [Letter of January 7, 1997 from Paul E. Kennedy to Mayor Elmer Doak].

21. By letter dated January 16, 1997, Bristol notified United Cities that under Section XIV of the 1995 franchise agreement,¹ the city would have the first right of refusal to purchase the assets of United Cities in Bristol and that the city would like to discuss its options in that regard.

22. By letter of February 11, 1997, Bristol's city manager advised United Cities that the city was "willing to begin negotiations as to a reasonable valuation of 'those assets' using the assessed amounts you have already provided for tax purposes as a starting point." [Letter of February 11, 1997 from Anthony R. Massey to Paul E. Kennedy].

23. By letter dated March 11, 1997, Bristol advised United Cities that:

"[C]ity staff has a responsibility to fully research whether our municipality would take over natural gas operations. Therefore, your proposed approval of the merger ordinance will not be acted upon by the City of Bristol."

"Thank you for your continuing cooperation. I look forward to speaking with you again soon toward resolving this matter to our mutual satisfaction." [Letter of March 11, 1997 from Anthony R. Massey to Paul E. Kennedy].

24. United Cities took the position that its proposed merger with Atmos fell outside the scope of Section XIV of the franchise agreement. [Memorandum of February 6, 1997 from Terence T. O'Meara to Mark G. Thessin, Esq.].

25. Any purchase by Bristol of United Cities' assets within the city was complicated by the fact that United Cities had a unified system serving both Bristol and its sister city, Bristol, Virginia. The separation of that system was discussed by United Cities in a letter to the city of April 14, 1997. The letter also requested "at the earliest convenience of the city council, an ordinance authorizing the transfer of the franchise for the natural gas transmission and distribution system in the City of Bristol, TN and

¹ "SECTION XIV: In the event the Company desires to sell or transfer the entire assets of the gas business which is the subject of this ordinance, then the Company must offer to the City the opportunity to buy those assets located and situated in the City of Bristol upon the same terms as being offered to some other party. The City will have sixty (60) days to accept the offer and an additional sixty (60) days to close said transaction, in the event the City elects to exercise the option to purchase." The Tennessee Regulatory Authority found that under United Cities' merger with Atmos "the entire assets of United Cities, and most of United Cities' employees, will be transferred to Atmos." In re Atmos Energy Corporation, Tennessee Regulatory Authority, Docket No. 96-01299, Order of January 24, 1997, 1997 WL 78685.

held by United Cities Gas Company be transferred to Atmos Energy Corporation. [Letter of April 14, 1997 from Paul E. Kennedy to Anthony R. Massey].

26. Bristol continued to explore whether it would pursue acquisition of the gas company's assets in the city. On one occasion city officials traveled to Nashville and met with the staff of the Tennessee Regulatory Authority. The TRA staff did not encourage the city to pursue the acquisition, and suggested that Bristol should try to reach a settlement with United Cities under which Bristol would refrain from getting in the gas business.

27. Bristol commenced negotiations with United Cities in an effort to reach a settlement by which the city would waive any rights it might have to acquire assets from the gas company under Section XIV of the 1995 franchise agreement and would authorize a transfer of that franchise to Atmos.

28. As part of its negotiations with United Cities, Bristol sought to amend its 1995 lease with the gas company so as to include an additional parcel of real property on which was situated an office building which United Cities intended to vacate. By letter of December 11, 1997, United Cities made a settlement proposal which included the following amendments to the 1995 franchise agreement:

- a. a recognition that United Cities was a division of Atmos Energy Corporation
- b. an extension of the 30-year term so as to commence from the date of the approval of the amended franchise ordinance and the filing of acceptance thereof by United Cities
- c. an increase in the franchise fee to 6%
- d. a provision stating that a statutory merger, consolidation, recapitalization, or sale or transfer of the common stock of United Cities would not constitute a sale or transfer of assets under Section XIV

In addition, United Cities' proposal to Bristol included the following amendments to the 1995 lease agreement:

- a. an extension of the 30-year term to correspond with the 30-year term of the amended franchise agreement

- b. including an addition tract of 1.69 acres on which was situated an office building which United Cities intended to vacate

Language making these amendments to the 1995 franchise agreement and the 1995 lease was included with the letter. [Letter of December 11, 1997 from Thomas R. Blose, Jr., President, to Tony Massey]

29. The proposal of United Cities was generally acceptable to Bristol. Negotiations as to the language for the amended lease continued between attorneys for Atmos and the city. Issues arose concerning the indemnification demanded by United Cities' attorney which would have required the city to waive its sovereign immunity by acquiring insurance with limits beyond that specified in the Tennessee Governmental Tort Liability Act. The city attorney and the city's insurance carrier recommended against using the language desired by United Cities' attorney. United Cities was concerned about its potential liability to someone who might be injured on the property leased to the city.

30. Finally, in 1999, all issues between Bristol and United Cities were resolved, and language for the amended lease was drafted which was acceptable to both parties. As part of the compromise, Bristol agreed it would use the additional leased tract only as a parking lot and it would not utilize the building for any purpose.

31. At its regular meeting on June 1, 1999, the Bristol city council considered the negotiated amendments to the franchise agreement (Ordinance 99-13) and the lease agreement (Ordinance 99-14) with United Cities. In his cover memorandum to the city council, the city manager stated:

"These two ordinances are linked to the overall agreement city staff has reached with United Cities Gas Company. As City Council is aware, we have been in negotiations for approximately 2½ years regarding the Atmos acquisition of United Cities Gas Company."

"Mr. Hyder's memorandums outline the agreement upon amendments to our franchise agreement. The city still retains the right to purchase and acquire natural gas operations in the future. We do, however, agree not to contest a corporate merger."

"City Council may also recall that the city received \$25,000 from United Cities Gas Company earlier this years as a good faith gesture. We earmarked \$20,000 toward the Avoca Library project and \$5,000 to the country music mural downtown."

"Ordinance 99-14 extends our lease agreement for the parking lot to include the United Cities Gas Company building and lot. Note that the United Cities/Atmos attorney agreed only to use the property as a future parking lot."

"I have been in discussion with Sullivan County officials regarding this property. They have indicated a willingness to cost share with Bristol in demolition and construction of a new parking lot at this site."

Attached was a memorandum from Bristol's city attorney outlining the changes to the franchise and the lease. The city attorney further advised the city council: "These two ordinances constitute a unified transaction with United Cities Gas Company. Neither ordinance can stand alone, and both must pass in order for either to become effective."

32. The Bristol city council passed both of the ordinances by unanimous (5-to-0) vote at its meeting on June 1, 1999.

33. At its regular meeting on August 5, 1999, the Bristol city council held a public hearing on Ordinance 99-13 (amended franchise). No one spoke at the public hearing. A public hearing was also held by the city council on Ordinance 99-14 (amended lease). No one spoke at the public hearing. Each ordinance was passed on final reading by unanimous vote of the city council.

34. Bristol's amended franchise agreement with United Cities was the product of arms' length negotiations between the city and United Cities extending over a period of 2½ years. United Cities freely and voluntarily consented to the terms of the amended franchise and agreed to its terms.

35. At all pertinent times, Bristol was acting in its proprietary capacity.

36. The obligations under the amended franchise were voluntarily assumed by United Cities, and were not the result of the exercise of a governmental power, but of a contract which both parties could make, and the annual payments agreed to by United Cities were compensation to be paid to the public for United Cities' exercise of the franchise, subject to assent of the city as proprietor of the public streets.

37. The amended franchise agreement was part of a package which Bristol had negotiated with the gas company and included a 30-year lease by the city of an additional tract of real property to be used by the public for free parking at the Bristol municipal building and the new Sullivan County Justice Center. The lease of the gas company property as a parking lot was essential for public access to the expanded local government offices.

38. In negotiating and entering into the agreements with United Cities, the Bristol city council was acting in the public interest as the duly elected representatives of the citizens of the city.

39. The settlement between United Cities and the citizens of Bristol, as embodied in the amended franchise agreement and the amended lease agreement, is beneficial to the public in numerous ways:

- it extends the 1995 lease of the gas company property to the city for a full 30-year period
- it assures the public it will be able to use this property as a parking lot for 30 years
- it provides the parking lot to the public at no cost
- it satisfies a critical need by the public for parking facilities adjacent to the Sullivan County Justice Center and the Bristol municipal building
- it gives the public an additional 1.69 acres to use for parking
- it provides this additional property for a 30-year period at no cost
- it resolves 2½ years of negotiations between United Cities and Bristol
- it resolves all issues between the city and the gas company with respect to the Atmos acquisition of United Cities' assets in Bristol
- it resolves the issue of whether the city will acquire and operate a gas system
- it gives the gas company a long-term commitment from the city, assuring the gas company it will have the right to operate in Bristol for the next 30 years and to use the public rights-of-way for its lines during that period
- it assures that United Cities, a private for-profit corporation, will compensate the public for its use of the public rights-of-way for its profit-making endeavors in the city
- it assures that the public will be compensated by the gas company for the risk assumed by the city in committing to the gas company for such a long term

- it gives the gas company a strong incentive to invest in additional infrastructure within the city for the long term so as to provide better and expanded gas service to the public
- it promotes industrial recruitment in Bristol and the surrounding area by assuring a long term presence of the gas company
- it assures that if the public right-of-way generates revenue for the gas company, then the public will share in that revenue
- it continues to give the public the right to acquire the assets of United Cities in the event of a sale or transfer, thereby assuring the public it will have gas service whether provided by a private corporation or a publicly owned utility

40. The amended franchise agreement is necessary and proper for the public convenience and properly conserves the public interest.

41. United Cities filed a petition before the Tennessee Regulatory Authority on June 30, 2000, seeking approval of the amended franchise on the ground that the same is "fair, necessary, reasonable and proper to serve the public convenience and conserve[s] the public interest."

42. By order filed on February 4, 2001, the motion of Bristol to intervene in this proceeding was granted.

II. CONCLUSIONS OF LAW

The City of Bristol submits that the principles of law which will control the issues in this proceeding are as follows:

A. No gas company may use the public rights-of-way of a municipality for its pipes without "having first obtained permission from the governing authorities thereof." Tenn. Code Ann. § 65-22-103.

B. "[B]efore any corporation may furnish [gas or] electricity within the territory of a municipality it must have the permission of that municipality, such permission being in the form of a franchise." Franklin Power & Light Company v. Middle Tenn. Elec. Membership Corp. 222 Tenn. 182, 434 S.W.2d 829, 831 (1968).

C. "[T]he privilege of occupying the streets, roads and public ways of cities or counties with its facilities must be obtained from the local political subdivision in which the utility operates." Briley v. Cumberland Water Company, 389 S.W.2d 278, 282 (Tenn. 1965).

D. Bristol has the power to allow a gas company to use its public rights-of-way and to prescribe the terms and conditions on which it may do so:

1. Section 2-5(14) of Bristol's city charter authorizes its city council to grant the right to use its streets for "such purposes as the city council may provide by ordinance; provided, that the city council shall not grant the exclusive right to any one person, firm, or corporation."

2. Tenn. Code Ann. § 65-26-101 empowers gas companies "to lay pipes and extend conductors through the streets, lanes, and alleys of any town, city, or village;" provided, "that no one of the streets or alleys shall be entered upon or used by any corporation for laying pipes and conductors, or otherwise, until the consent of the municipal authorities shall have been obtained, and an ordinance shall have been passed prescribing the terms on which the same may be done."

E. "Municipalities in Tennessee have the right to grant exclusive franchises for public utilities, regardless of the form of municipal government." South Fulton v. Hickman-Fulton Counties, 976 S.W.2d 86, 89 (Tenn. 1998).

F. In Tennessee, a municipal corporation functions in two basic ways -- it acts either in its propriety capacity or in its governmental capacity. Bristol Tennessee Housing Authority v. Bristol Gas Corporation, 219 Tenn. 194, 407 S.W.2d 681, 683 (1966); City of Paris v. Paris-Henry County Public Utility District, 207 Tenn. 388, 340 S.W.2d 885, 888 (1960).

G. "Acting in its propriety capacity a municipality may exact a charge for the use of its rights-of-way which is unrelated to the costs of maintaining the rights-of-way, but in its governmental capacity, it may only act through an exercise of its police power to regulate a specific activity or defray the cost of providing services or benefit to the party paying the fee. City of Chattanooga v. BellSouth Telecommunications, Inc., No. E1999-01573-COA-R3-CV, 2000 WL 122199 (Tenn. App. January 26, 2000), citing *inter alia* City of Tullahoma v. Bedford County, 938 S.W.2d 408 (Tenn. 1997).

H. It has long been the law in Tennessee "that a city holds its public ways, not in its governmental, but in its propriety or corporate capacity." City of Winchester v. Finchum, 201 Tenn. 604, 301 S.W.2d 341, 343 (1957), quoting City of Memphis v. McCrady, 174 Tenn. 162, 124 S.W.2d 248, 249 (1938); City of Greenfield v. Butts, 582 S.W.2d 80, 83 (Tenn. App. 1979); accord: Vinson v. Fentress, 33 Tenn. App. 359, 370, 232 S.W.2d 272, 276 (1950) and City of Nashville v. Brown, 25 Tenn. App. 340, 345, 157 S.W.2d 612, 615 (1941).

I. "[A] municipal corporation for the government of a town or city is the proprietor of the streets, which it holds as easements, in trust for the benefit of the corporation." Fleming v. City of Memphis, 126 Tenn. 331, 337, 148 S.W. 1057 (1912). Streets and other public rights-of-way are held by the city "in trust for the convenience of its citizens," and this "falls within the proprietary or private aspect of the duties of municipal corporations, rather than their governmental functions." McCay v. DuPont Rayon Company, 20 Tenn. App. 157, 96 S.W.2d 177, 182 (1935); accord: Humes v. Mayor & Aldermen of Knoxville, 20 Tenn. (1 Humph.) 304, 308 (1839) (municipality "is the proprietor of the public streets of the town, which are held in trust as easements for the convenience of the citizens"). All property of a municipality "is held by the corporation in trust for the public." Board of Directors of St. Francis Levee Dist. v. Bodkin, 108 Tenn. 700, 706, 69 S.W. 270 (1902).

J. Whether to allow a private enterprise to use public property, and the compensation to be paid by such enterprise to the public, are matters "of judgment to be exercised by the duly elected City officials," and their decision will be upheld in the absence of a showing that such "is contrary to the public interest, that it represents a misuse or abuse of the discretion and authority of the Board of Commissioners, or that it is in any other way Ultra vires or beyond the legitimate charter powers of the City." State ex rel. Association for Preservation of Tennessee Antiquities v. City of Jackson, 573 S.W.2d 750, 755 (Tenn. 1978).

K. "[A]n intelligent board of aldermen are more capable of forming a correct judgment as to what measures are of a nature to promote, more or less directly, the general interests and prosperity of the town, than any other tribunal." Adams v. Memphis & Little Rock Railroad Company, 42 Tenn. 645, 655-656 (1866), *quoting* McCallie v. Town of Chattanooga, 40 Tenn. 317, 321-322 (1859).

L. "The best and ultimate watchdog to assure that the people's rights are protected and that the taxpayer's money is being honestly and properly spent is the ballot box. To the extent public officials are lax in these critical respects, they should be and usually are replaced. Our republic has survived in this fashion for over two centuries." State ex rel. Vaughn v. King, 653 S.W.2d 727, 731-732 (Tenn. App. 1982).

M. "Both legislative and administrative decisions [of a local governing body] are presumed to be valid and a heavy burden of proof rests upon the shoulders of the party who challenges the action." McCallen v. City of Memphis, 786 S.W.2d 633, 641 (Tenn. 1990).

N. It is not lawful for a gas company "to acquire the franchises or property of any similar corporation carrying on its operations with any city or town, or partly in such city or town and in the territory adjacent to same, by consolidation, purchase, lease or other mode, except only by and with the permission and consent, expressed officially in writing, of the municipal government of the city or town in which the corporation whose franchises or property is being acquired carries on its business, wholly or in part, and then only upon such terms and conditions as the municipal government may prescribe; provided, that such terms and conditions shall not violate any law." *Tenn. Code Ann.* § 6-54-109(3).

O. Under *Tenn. Code Ann.* § 6-54-109(3), it would not have been lawful for Atmos to have acquired the franchise or property of United Cities in Bristol without the official written consent of the city upon such lawful terms and conditions as the city might prescribe.

P. The City of Bristol has the power to acquire, operate and maintain a gas system for the use and benefit of itself, its inhabitants and the persons, firms and corporations whose residences or places

of business are located outside the territorial boundaries of the municipality. *Tenn. Code Ann.* § 7-34-104(a)(1), (2).

Q. "Any franchise payment or other payment for the use of public streets, alleys or other public places or any license, privilege, occupation or excise tax payment, which after February 24, 1961, may be made by a utility to a municipality or other political subdivision, except such taxes as are presently provided for under existing statutes and except such franchise payment or other payments as are presently exacted from the utility pursuant to the terms of any existing franchise or other agreement, shall, insofar as practicable, be billed pro rata to the utility customers receiving local service within the municipality or political subdivision receiving such payments, and shall not otherwise be considered by the authority in fixing the rates and charges of the utility." *Tenn. Code Ann.* § 65-4-106(e).

R. "No privilege or franchise hereafter granted to any public utility by the State of Tennessee or by any political subdivision thereof shall be valid until approved by the authority, such approval to be given when, after hearing, the authority determines that such privilege or franchise is necessary and proper for the public convenience and properly conserves the public interest * * *." *Tenn. Code Ann.* § 65-4-107.

S. A gas company's franchise with a municipality is "dependent upon approval and consent of the municipal government and upon such terms and conditions as it might impose. The power to assent and impose conditions thus recognized by the Legislature carried with it the correlative right of the city to make terms and impose conditions." Lewis v. Nashville Gas & Heating Company, 162 Tenn. (9 Smith) 268, 40 S.W.2d 409, 411 (1931).

T. "One of the conditions which a municipal corporation can lawfully attach to the grant of a franchise is the payment of money; and the payment need not be such as is imposed upon all others similarly situated, as in the case of a tax, or the equivalent of the cost of inspection and replacement, as in the case of a license fee imposed under the police power, but may be a definite sum arbitrarily

selected, and if the company does not wish to pay it need not accept the franchise." Lewis v. Nashville Gas & Heating Company, 40 S.W.2d at 413, *quoting* Portsmouth v. Virginia Railway, 141 Va. 54, 126 S.E. 362.

U. Where payments prescribed by a franchise ordinance "result from the contract voluntarily engaged in and which both parties could make, the question as to an exercise of governmental power by the city is not involved." Lewis v. Nashville Gas & Heating Company, 40 S.W.2d at 413.

V. "The city was authorized by statute to prescribe the terms and conditions upon which the gas company might enter and establish its business. That, it appears, was done through negotiations with the gas company, and the obligation, voluntarily assumed by it, was not the result, of the exercise of a governmental power, but of contract which both parties could make, and the annual payments prescribed by * * * the ordinance were compensation to be paid the city for the exercise of the franchise, conditionally granted by the state, subject to assent of the city as proprietor of its streets. Lewis v. Nashville Gas & Heating Company, 40 S.W.2d at 412-413 (internal citations omitted).

W. "The exercise of the right of contract by the municipality is not to be confused with the limited power of sovereignty delegated to municipal corporations. They are dual entities, possessing both corporate and limited governmental power. As an agency of the state, the municipality could exercise such governmental power as was delegated to it. As a corporate entity endowed with proprietary or corporate rights, it could, to a certain extent, contract." Lewis v. Nashville Gas & Heating Company, 40 S.W.2d at 412.

X. A municipal ordinance granting a utility the right to construct and maintain gas pipes under the surface of city streets for a term of years, upon acceptance by the utility, becomes "a franchise and a contract, binding the City in its proprietary capacity, and giving [the utility] the right to make use of the streets in installing its pipes; and that this contract right could not be revoked or impaired by the

City." City of Paris v. Paris-Henry County Public Utility District, 207 Tenn. 388, 430 S.W.2d 885, 888 (1960).

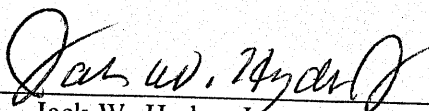
Y. The contractual obligation of a gas company, under a municipal franchise ordinance, to pay the city five percent (5%) of the company's gross receipts from the sale of gas in the city is not an unlawful tax; to the contrary, "this annual charge on gross receipts was not one imposed by the City in the exercise of the taxing power, but as a payment prescribed or exacted under a contract for the use of the streets, etc." Nashville Gas & Heating Company v. City of Nashville, 177 Tenn. 590, 152 S.W.2d 229, 232 (1941).

Z. Such a franchise fee "is compensation required by the City to be paid for the use of its streets, etc., i.e., a rental payment or payment in the nature of rental." Nashville Gas & Heating Company v. City of Nashville, 152 S.W.2d at 233.

AA. The amended franchise negotiated by Bristol and United Cities was "granted by the City of Bristol acting in its proprietary capacity, is a binding contract which cannot be revoked or impaired by the city." Bristol Tennessee Housing Authority v. Bristol Gas Company, 407 S.W.2d at 683.

Respectfully submitted,

CITY OF BRISTOL TENNESSEE

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CERTIFICATE OF SERVICE

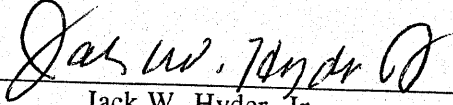
The undersigned certifies that on March 14, 2002, a copy of the foregoing was served by hand delivery to each of the following counsel who were present at the hearing at which the original was submitted to the hearing officer:

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